EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

No. 91-1408

Supreme Court, U
FILED
JAN 21 1992
OFFICE OF THE CL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

DAVID CHAGALL --
PETITIONER

vs.

BARRY SOBEL, M.D., et al,
RESPONDENT

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT
OF THE STATE OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

David Chagall,
28232 Foothill Drive
Agoura Hills, CA 91301
(818) 889-3711

Petitioner in Propria Persona

QUESTIONS PRESENTED

1. Did the California Trial Court, in changing the basis of its decision from Constitutional to nonfederal grounds, seek to evade U.S. Constitutional standards?

2. In light of the U.S. Supreme Court ruling in Milkovich v. Lorain Journal Co. (1990), can "letters to the editor," because of their placement on editorial pages of newspapers, be deemed de facto priveleged communications of opinion and thereby "non-actionable"?

3. Can a 1990 U.S. Supreme Court ruling defining opinion privelege be denied to a parallel State case where no prior statute or State Supreme Court ruling now governs?

4. Can State Courts avoid applying a U.S. Supreme Court ruling to a parallel ongoing case by claiming immunity from retroactivity?

TABLE OF CONTENTS

	Page
PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA .	1
OPINIONS BELOW	2
JURISDICTION	3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	7
ARGUMENT	8
CONCLUSION	27

INDEX TO APPENDICES

Appendix A	Opinion of the California State Court of Appeal, 2nd Appellate District (1991)
Appendix B	Minutes of the Trial Court sustaining respondent's demurrer without leave to amend, based on the U.S. Constitution
Appendix C	Minutes of the Trial Court sustaining respondent's demurrer without leave to amend, based on the California constitution

Appendix D	Supreme Court of California's denial of petition to review (November 20, 1991)
Appendix E	Article III, Section 2 to the United States Constitution
Appendix F	Amendment I to the United States Constitution
Appendix G	Amendment VII to the United States Constitution
Appendix H	Amendment XIV, Section 2 to the United States Constitution

TABLE OF AUTHORITIES CITED

CASES — Page

Ancient Egyptian Arabic Order of Notables of the Mystic Shrine v. Michaux, (Tex.1929), 49 S.Ct. 485, 279 U.S. 737, 73 L.Ed. 891.. 23

Baker v. Los Angeles Herald Examiner (1986) 42 C.A.3d 254). 10-16

England v. Hospital of Good Samaritan (1939) 14 C.2d 791, 795, 97 P.2d 813 . . . 23

Fox River Paper Co. v. Railroad Commission of Wisconsin (Wis.1927), 47 S.Ct. 669, 274 U.S. 651, 71 L.Ed. 1279 10

Fuhrman v. Risner (1979) 92 Cal.3d, 102, 149 Cal. Rptr. 914 18

In re Marriage of Brown (1976) 15 C.3d 838, 850, 126 C.R. 633, 544 P.2d 561 22

James B. Beam Distilling Co. v. Georgia (1991) 115 L Ed 2d 481 20

Li v. Yellow Cab Co. (1975) 13 C.3d. 804, 829, 119 C.R. 858, 532 P.2d. 1226 22

McCleod v. Tribune Publishing Co. (1959) 52 C.A.2d 536, 547, 343 P.2d 36 . . 14

Michigan v. Long, 463 US 1032, 77 L Ed 2d 1201, 103 S Ct 3469 (1983) at 1040-1041 . .12

Milkovich v. Lorain Journal Co. (1990) 497 U.S.__, 111 L Ed 2d 1, 2d 1, 110 S Ct. 2,5,6,9,11,12,15,16,25

Neel v. Magana et al (1971) 6 C.3d 176, 193, 194, 98 C.R. 837, 491 P.2d. 421 . . 22

Ollman v. Evans, 242 US App DC 301, 750 F2d (1984) 11

People v. Moreno (1977) 66 C.A.3d 962, 967, 134 C.R.322) 16

Rosenblatt v. Baer, 383 US 75, 86, 16 L Ed 2d 239, 86 S Ct 1170 (1966 . . . 26

Safeway Stores v. Nest-Kart (1978) 21 C.3d 322, 146 C.R. 550, 579 P.2d 441 22

Ventura v. Camarillo (1978) 80 C.A.3d 1019, 1023, 144 C.R.296 22

Wellenkamp v. Bank of America (1978) 21 C.3d 943, 954, 148 C.R.379, 582 P.2d 970...22

STATUTES

United States Code

Title 28, Section 1257(3) 3

United States Constitution:

Article III, Section 2 21

First Amendment 4,8,16,25

Seventh Amendment 18

Fourteenth Amendment 25

California Code

Code of Civil Procedures, Section 916 . 4

California Constitution

Article I, Section 2 19

Article III, Section I 24

OTHERS

Harv.L. Rev. 652 24

26 So. Cal. L. Rev. 184 24

Wm. & Mary L. Rev., Vol.11 (1969), at p.415 26

California Procedure, 2d 1979 Supplement at p.110 22

NO. _____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

October Term, 1991

DAVID CHAGALL, Petitioner

vs.

BARRY SOBEL, M.D. ET AL, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

Petitioner, DAVID CHAGALL, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of California, denying review of Appellate Court's decision sustaining respondent's demurrer without leave to amend, asserting that subject letter to the editor is action-proof as opinion,

when it clearly satisfies standards of actionable false statements of fact as clarified by the U.S. Supreme Court's ruling Milkovich v. Lorain Journal Co. Et Al (1990).

OPINIONS BELOW

The unpublished written opinion of the Court of Appeals of the State of California appears in Appendix A to this petition. The minutes of the trial court sustaining respondent's demurrer without leave to amend based on "First Amendment privelege" appears in Appendix B to this petition. The minutes of the trial court vacating previous dismissal based on the U.S. Constitution, but sustaining previous judgment "based on the California Constitution and California cases" appears in Appendix C to this petition.

JURISDICTION

The Court of Appeals' unpublished written Opinion in this matter was filed on August 14, 1991. A timely Petition for Review by the Supreme Court of the State of California was filed on September 20, 1991. The Supreme Court of the State of California's denial of the Petition for Review was issued and filed on November 20, 1991 and is set forth in Appendix D. This Court's jurisdiction is invoked under Title 28, U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2 of the United States Constitution is set forth in Appendix E. Amendment I to the United States Constitution is set forth in Appendix F. Amendment VII to the United States Constitution is set forth in Appendix G. Amendment XIV to the United States Constitution is set forth in Appendix H.

STATEMENT OF THE CASE

The Superior Court of California in Los Angeles County at Van Nuys had original jurisdiction pursuant to California's Code of Civil Procedures § 916.

This action was commenced on October 27, 1989 by plaintiff and petitioner David Chagall. On that date a complaint for libel and slander was filed, based on a letter to the editor of the Acorn newspaper published November 9, 1988 (Appellate Court decision, Appendix A, p.16).

Petitioner filed a first amended complaint with the trial court on February 13, 1990. Defendant and Respondent Sobel demurred to the first amended complaint, and the trial court sustained the demurrer without leave to amend on May 14, 1990, ruling "based on privelege set forth in the First Amendment to the Constitution" (Appendix B).

An order dismissing the action was filed

June 18, 1990. Service of the order was filed on June 29, 1990.

On July 2, 1990, petitioner filed a motion for reconsideration, based on the U.S. Supreme Court decision of June 21, 1990, Milkovich v. Lorain Journal Co. (1990) 497 U.S.____, 111 L.Ed.2d 1, 110 S.Ct.___. On October 4, 1990, the trial court sustained the petitioner's motion for reconsideration. It vacated the minute order of May 14, 1990, and it vacated its order dismissing the action "based on privelege set forth in the First Amendment to the Constitution." On the same date, the trial court proceeded to again sustain the demurrer without leave to amend, this time "based on the California constitution and California cases" (Appendix C).

An order dismissing the action was filed October 18, 1990. Notice of entry of dismissal was filed November 14, 1990.

Petitioner filed a notice of appeal from

the entry of dismissal "against the Plaintiff and in favor of the Defendant" on December 12, 1990.

On July 25, 1991 the Appellate Court considered briefings and heard oral arguments of the case at issue, at which time petitioner argued that the United States Constitution and its interpretations are the supreme laws of the land and should constitutionally apply to California courts; that the California constitution and case law recognize the distinction between fact and opinion and the clarified definition of "opinion privelege" obtaining in Milkovich v. Lorain Journal Co. (supra) should be applied in this case; that California case law itself affords no blanket privelege for all statements labeled "opinion;" and that the letter to the editor in the case at bench actually consists in verifiable defamatory factual statements.

On August 14, 1991, the Appellate Court

affirmed the judgment of the trial court, ruling that "under California case law prior to Milkovich, the letter to the editor in the case at bench was not actionable.. We will not make actionable the exercise of speech that was not actionable in California at the time it was made" (Appendix A, p.14).

A petition for review by the Supreme Court of the State of California requesting reversal was filed on September 20, 1991. The appellant's petition for review was denied on November 20, 1991 (Appendix D).

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for three reasons: (1) Certiorari is properly invoked because the State Courts denied petitioner a federal right by interposing a substitute decision on a nonfederal ground, thereby seeking to evade a previously claimed United States Constitutional ground; (2)

State Courts denied petitioner a federal right, in substance and effect, by interposing a nonfederal ground of decision without fair support; and (3) State Courts denied petitioner his Constitutional right to a trial by jury by improperly sustaining respondent's demurrer to petitioner's pleading without leave to amend.

ARGUMENT

I. STATE COURTS SOUGHT TO EVADE A PREVIOUSLY ASSERTED U.S. CONSTITUTIONAL GROUND BY INTERPOSING A SUBSTITUTE DECISION BASED ON STATE GROUND NOT CLAIMED IN PLEADING.

On May 14, 1990, the trial court sustained Respondent's demurrer without leave to amend, asserting protection for opinion, said "Ruling based on privelege set forth in the First Amendment to the Constitution" (Appendix B). Respondent's demurrer did not claim opinion privelege based on the

California State constitution and state law.

When the U.S. Supreme Court in Milkovich (supra) clarified First Amendment privelege for statements of opinion, petitioner moved for reconsideration, which motion was granted on October 4, 1990 (Appendix C). The previous ruling was vacated, as was the order dismissing action, filed June 18, 1990. Then, at the same hearing and at the same time, the Trial Court sustained the demurrer without leave to amend, "based on the California constitution and California cases," when in fact the demurrer itself had never claimed such nonfederal privelege (CT 59).

By substituting a nonfederal ground, the trial court clearly sought to evade the Constitutional issue, which it acknowledged by granting the petitioner's motion for reconsideration, thereupon substituting a nonfederal ground in its stead (Appendix C). The apellate court reiterated the evasive

substitution in its unpublished dicta (Appendix A, pp.11-12). In such instances, a litigant is entitled to invoke the judgment of the United States Supreme Court, based on Fox River Paper Co. v. Railroad Commission of Wisconsin (1927) 47 S.Ct. 669, 274 U.S. 651, 71 L.Ed 1279.

II. STATE COURTS DENIED PETITIONER A FEDERAL RIGHT, IN SUBSTANCE AND EFFECT, BY INTERPOSING NONFEDERAL GROUND OF DECISION WITHOUT FAIR SUPPORT

A. Appellate Court's decision is based at least in part on an 'interwoven' adaptation of prior federal law

The appellate court in its decision stressed that state courts "treated statements of opinion as constitutionally protected but imposed civil liability for statements of false fact" (Appendix A at p.11, citing Baker v. Los Angeles Herald Examiner (1986) 452 Cal.3d 254, 259-260). In reiterating what was, and still is, the federal standard, the court added this

qualification--"At least until the United States Supreme Court decided Milkovich v. Lorain Journal Co." (supra).

The court goes on to state that "Prior to Milkovich, California courts developed a 'totality of the circumstances' test to determine whether an alleged defamatory statement is one of opinion, and thereby protected, or one of fact" (Appendix A, pp.12-13).

In fact, the California Baker case in 1986 adopted its "totality of circumstances" doctrine from an earlier 1984 decision by a federal United States Court of Appeals (Ollman v. Evans, 242 US App DC 301, 750 F2d 970 (1984). Thus, though the state court claimed independent state grounds for defining the differerences between opinion and fact, to some extent it relied on prior federal decisions. As the Supreme Court pointed out in its Milkovich opinion (supra), if a state court's decision is at least

"'interwoven with the federal law.. (yet fails to make a) plain statement.. that the federal cases.. (did) not themselves compel the result that the court reached,' under Long.. federal review is not barred" (Milkovich v. Lorain Journal Co. (supra) at p.13, [2c,3c,4b] citing Michigan v. Long, 463 U.S. 1032, 77 L Ed 2d 1201, 103 S Ct 3469 (1983) at 1040-1041).

Addressing the "totality of circumstances" doctrine used by California courts, this doctrine relies on several independent elements. First, the language of the statement is examined. For words to be defamatory, "they must be understood in a defamatory sense" (Appendix A, p.13).

The Baker (supra) Court further defined words understood in a defamatory sense: "Where the language of the statement is 'cautiously phrased in terms of apparency,' the statement is less likely to be reasonably understood as a statement of fact rather than

opinion." (Baker at page 257). Petitioner submits that the publication here at issue totally fails this test on both counts.

The second test to be applied citing Baker states: "Next, the context in which the statement was made must be considered... This contextual analysis demands that the Courts look at the nature and full content of the communication and to the knowledge and understanding of the audience to whom the publication was directed." (Appendix A at p.13, citing Baker at pp.260-261).

The Court further clarified "contextual analysis" in its Baker decision, which clarification was omitted by the Appellate Court's opinion, namely: "It must be read as a whole in order to understand its import and the effect which it was calculated to have on the reader, and construed in the light of the whole scope and apparent object of the writer (emphasis added), considering not only the actual language used, but the sense and

meaning which may have been fairly conveyed to those who read it. If the publication so construed is not reasonably susceptible of a defamatory meaning and cannot be reasonably understood in the defamatory sense pleaded, the demurrer was properly sustained" (Baker at p.258).

Viewed through the eyes and mentality of the typical reader of the subject publication, the author's apparent object was clearly not political commentary as such, but rather an ad hominem attack upon the credibility, character and reputation of the petitioner for the purpose of villification. "The Court must place itself in the position of the hearer or reader, and determine the sense and meaning of the statement, according to its natural and popular construction." (Baker citing McCleod v. Tribune Publishing Co. (1959) 52 Cal.2d 536, 547, 343 P.2d 36)

Applying these measures of "sense and meaning" according to "natural and popular

construction," the publication here at issue conveys a series of factual statements, devoid of apparency and overblown idiom not intended to be understood literally. As the Supreme Court noted in Milkovich (supra, at p.19), "This is not the sort of loose, figurative or hyperbolic language which would negate the impression that the writer was seriously maintaining petitioner committed the crime of perjury. Nor does the general tenor of the article negate this impression."

Likewise, in the case at issue the language used is literal, non-idiomatic and clearly understandable only in its ordinary, commonly-used sense, so that the reader would be induced to believe petitioner committed the crimes of tax fraud, cruelty to animals, and bribery.

Finally, the Appellate Court makes its main point by emphasizing one element of Baker's 'totality of circumstances' dicta, namely that "..columns which appear in the

opinion-editorial pages of newspapers are 'the well-recognized home of opinion and comment. (emphasis in original, Baker, supra, 42 Cal.3d at pp.267-268; see Appendix A at p.14). In effect, it argues that "letters to the editor" are de facto priveleged as opinion. However, the dicta on which this claim is based is without force as precedence by California Courts (People v. Moreno (1977) 66 C.A.3d 962, 967, 134 C.R.322). California Courts have never ruled upon the issue as to whether a letter-to-the-editor is de facto priveleged as a communication of opinion.

In the principle expounded in Milkovich, the U.S. Supreme Court clarified this point for all concerned: "We are not persuaded that.. an additional separate constitutional privelege for 'opinion' is required to ensure the freedom of expression guaranteed by the First Amendment. The dispositive question.. then becomes whether or not a reasonable factfinder could conclude that the statements

in the Diadiun column imply an assertion that petitioner Milkovich perjured himself in a judicial proceeding.. We also think the connotation that petitioner committed perjury is sufficiently factual to be suceptible of being proved true or false" (Milkovich, supra, at p.19).

The Respondent's letter, without further explanation, contains numerous statements of fact implying that petitioner committed tax fraud, cruelty to animals and bribery, which assertions are libelous per se and ad hominem villifications designed to destroy the public repute of their target. All these statements are sufficiently factual to be susceptible of being proved true or false.

In a parallel California libel case by a former councilman against a civic group, a triable issue of fact was presented as to whether the assertion plaintiff had committed "blackmail," where the letter omitted any reference to the fact a sum of money

allegedly "blackmailed" from a developer by the councilman was paid after agreement to pay the money had been reached in a city council executive session, was a factual claim. It was held for the jury to determine whether an ordinary reader would have understood the reference as charging plaintiff with a crime, or would have understood it as an opinion regarding his public conduct over a development project. (Fuhrman v. Risner (1979) 92 CA3d. 102, 149 Cal. Rptr.914)

By not granting this petitioner a similar jury determination, petitioner was denied his U.S. Constitutional right to a trial by jury, in compliance with Amendment VII of the United States Constitution (Appendix G).

Even the Appellate Court stopped short of asserting that this single element of placement in editorial pages is a primary basis for ascribing to letters-to-the-editor blanket privelege as opinion. The court

acknowledges this weakness by concluding: "We need not decide if the letter is currently actionable under Milkovich or is protected under independent California constitutional protection of free speech" (Appendix A at p.14). Yet, the California Constitution actually provides less lattitude for expression than does the First Amendment, stating that "Every person may freely.. publish his sentiments on all subjects, being responsible for the abuse of this right" (emphasis added, citing the California constitution, Article I, § 2).

B. Appellate court's reliance on retroactive bar to Milkovich not supported by federal or state precedent, or in equity

The appellate court finally pinned its affirmation of the trial court's decision on a single premise, namely "we will not make actionable the exercise of speech that was not actionable at the time it was made" (Appendix A at p.14).

Using that line of reasoning, all contemporaneous clarifications in the law might also be resisted by ongoing litigation affected by it, not excluding the Lorain Journal Company itself in Milkovich, since both Diadiun and the newspaper publisher were exercising speech "not actionable at the time it was made." But there is clear precedent, both in federal cases and California state law, under the doctrine of equity, that the rulings in Milkovich be applied to this petitioner's case.

A recent decision of the United States Supreme Court ruled that a state statute imposing discriminatory tax on imported liquors be held to apply retroactively to litigants in other cases (James B. Beam Distilling Co. v. Georgia (1991) 115 L Ed 2d 481). Though the justices in this case concurred in the ultimate judgment, they were unable to agree on an opinion. Nonetheless, this petitioner cites the general principles

in equity expressed by two justices, namely as an issue of choice of law, it was required by principles of equality, under which similarly situated litigants should be treated the same; and by principles of stare decisis, where a new rule of law has been applied by the Supreme Court to the litigants in one case, such rule must be applied with respect to all other litigants who are not barred by procedural requirements or by res judicata. Such application accords with the Court's Constitutional mandate under Article III, Section 2: "The judicial power shall extend to all cases, in law and equity, arising under this Constitution.." (Appendix E).

California courts likewise recognize the principle of limited retroactivity. A series of California cases "have taken a middle course between complete prospectivity and complete retroactivity, making the decision apply to any case in which no final judgment

has yet been rendered" (California Procedure, 2d 1979 Supplement, at p.110). [See also Neel v. Magana et al (1971) 6 C.3d 176, 193, 194, 98 C.R. 837, 491 P.2d 421; Li v. Yellow Cab Co. (1975) 13 C.3d 804, 829, 119 C.R. 858, 532 P.2d 1226; In re Marriage of Brown (1976) 15 C.3d 838, 850, 126 C.R. 633, 544 P.2d 561.]

In its published opinion In re Marriage of Brown (supra), the court concluded: "Our decision will apply retroactively, however, to any case in which the property rights arising from such a marriage have not yet been adjudicated, and to such rights if such ajudication is still subject to appellate review.." (emphasis added). This principle of limited retroactivity was followed in Wellenkamp v. Bank of America (1978) 21 C.3d 943, 954, 148 C.R. 379, 582 P.2d 970; Safeway Stores v. Nest-Kart (1978) 21 C.3d 322, 333, 146 C.R. 550, 579 P.2d 441; and Ventura v. Camarillo (1978) 80 C.A.3d 1019, 1023, 144

C.R.296.

In England v. Hospital of of Good Samaritan (1939) 14 C.2d 791, 795, 97 P.2d 813, California Courts ruled that a doctrine may be rejected whenever the erroneous rule of law is made clear by controlling authority. In a negligence suit against a charitable hospital, the charitable immunity doctrine was operative in California. On the third appeal, the California Supreme Court in a companion case, abrogated the immunity rule. Holding that the new rule of liability applied to the former appellant, it stated "Rigid adherance to the law of the case would compel a most unjust decision."

In England what had not been actionable under former doctrine became actionable under the new rule. Certiorari is properly invoked when State Courts deny a federal right, either directly or in substance and effect, by interposing a nonfederal ground of decision without fair support (Ancient

Egyptian Order of Notables of the Mystic Shrine v. Michaux (1929) 49 S Ct 485, 279 US 737, 73 L Ed 891).

Inasmuch as the petitioner's cause was still in litigation when Milkovich was decided, and the basis used by the trial court to sustain the demurrer was the very First Amendment addressed by this decision, the appellate court should properly have reversed and remanded the case for trial.

C. Binding Authority of the United States Supreme Court

Decisions of the United States Supreme Court are binding not only on all lower federal courts but also on state courts where a federal question is involved (see Harv.L. Rev. 652; 26 So. Cal. L. Rev. 184). The California Constitution recognizes this supremacy by stating: "The State of California is an inseparable part of the United States of America, and the United

States Constitution is the supreme law of the land" (Article III, Section 1).

The U.S. Supreme Court in Milkovich has clarified U.S. First Amendment guarantees of freedom of speech, together with its restrictions, and coupled with 14th Amendment guarantees against States denying to any person equal protection under Constitutional laws (Appendix H), makes these binding on all other courts.

Protecting false, destructive expression as "opinion" serves no positive social value. As the Supreme Court pointed out in Milkovich: "The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being--a concept at the root of any decent system of ordered liberty.. The destruction that defamatory falsehood can bring is, to be sure, often beyond the

capacity of the law to redeem. Yet, imperfect though it is, an action for damages is the only hope for vindication or redress the law gives to a man whose reputation has been falsely dishonored" (Milkovich, supra at p.20, citing Justice Stewart in Rosenblatt v. Baer, 383 US 75, 86, 16 L Ed 2d 239, 86 S Ct 1170 (1966) at pp.92-93).

The William and Mary Law Review has emphasized this same principle: "Society has no interest in protecting lies or sheltering the character assassin or the printer who is grossly negligent. The Press may be restrained by the threat of a libel suit, but the restraint will only prompt more thorough investigation" (William and Mary Law Review, Vol.11 (1969), "Libel and the Supreme Court, at p.418).

This Court should grant certiorari here to explictly rule that the California courts sought to evade U.S. Constitutional clarifications for "opinion;" that the

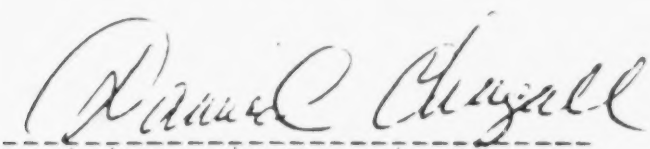
question of retroactivity herein does not apply; that the Milkovich rulings on "opinion" be applied to the petitioner's case so that "letters to the editor" not be specially exempted from defamation responsibility; and that petitioner's right to a trial by jury shall not be denied.

CONCLUSION

For the reasons set forth above, therefore, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals in this matter.[1]

DATED: February 21, 1992

Respectfully submitted,



Petitioner in Propria Persona

1

If this Court elects not to address the issues presented in this writ at the present time, it is requested that the writ issue and that the matter be remanded to the Court of Appeals for redetermination in light of this Court's opinions in Milkovich (supra).

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1991

NO. _____

DAVID CHAGALL, PETITIONER
V.
BARRY SOBEL, RESPONDENT

PROOF OF SERVICE

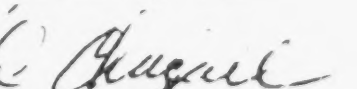
I, DAVID CHAGALL, do swear and declare that on this date, February 21 1992, pursuant to Supreme Court Rules 29.3 and 29.4, I have served the enclosed PETITION FOR WRIT OF CERTIORARI on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

Clerk, the U.S. Supreme Court, 1 First Street, N.E., Washington, D.C. 20543 (40 copies);

Clerk, California, Supreme Court, 300 S. Spring Street, 2nd Floor, Los Angeles, CA 90013 (1 copy);

Michael Thomas, 535 N. Brand Blvd., 5th Floor, Glendale, CA 91203: attorney for Respondent (1 copy).



DAVID CHAGALL,
Petitioner in Propria Persona

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION TWO

DAVID CHAGALL,	)	B055394
	)	
Plaintiff and Appellant,	)	(Super.Ct.No.
	)	NWC52693)
v.	)	
	)	
BARRY SOBEL,	)	
	)	
Defendant and Respondent.	)	
	)	[FILED: August 14, 1991]

APPENDIX A

Appellant David Chagall appeals in pro. per. from the trial court's order dismissing this action following the sustaining of respondent Barry Sobel, M.D.'s, demurrer to appellant's complaint without leave to amend.[1]

Appellant's first amended complaint for libel and slander is based primarily on a letter to the editor of the Acorn Newspaper from respondent Barry Sobel. The letter was published November 9, 1988, and is attached as an appendix to this opinion. Appellant

---

1. Baker Communications, Inc., publisher of The Acorn, the newspaper in which the alleged defamatory statements were published, was also a named defendant in the complaint and has filed a respondent's brief on appeal. The record on appeal, however, does not reveal that Baker Communications, Inc., ever filed a demurrer to appellant's complaint. The minute orders for the relevant proceedings do not indicate counsel for Baker Communications was even present. Baker Communications and the Acorn are not proper respondents to this appeal, and our decision concerns only the trial court's decision sustaining respondent Sobel's demurrer to appellant Chagall's complaint and dismissing the complaint as to Sobel.

claims the following statements are false, not priveleged and were made with knowledge of their falsity and with reckless disregard; we quote the complaint which sets forth the allegedly defamatory statements and explains why appellant believes they are defamatory:

"(a) 'Mr. Chagall is "president" of the "United Neighbors.. a developer and industrialist run organization.' United Neighbors has been chartered since 1987 as a tax-exempt, nonprofit civic and educational organization, incorporated under California Revenue and Taxation Code 23701, sections 501(c)(3) and 501(c)(4), California Corporate No.1396806, so this allegation, if true, is punishable as constituting crimes of fraud and perjury, and is therefore libelous per se.

"(b) 'Mr. Chagall lives in an equestian community but purposely plants trees in front of his house poisonous (emphasis in original) to horses.' This statement falsely accuses

plaintiff by name of the crime of cruelty to animals by setting out poisonous substances where animals belonging to another might ingest it, according to Section 104010 of the Los Angeles County Penal Code, and is therefore libelous per se.

"(c) It falsely characterizes plaintiff as being of cruel and base character, interested only in money, charging 'This isn't a good neighbor; this is a cruel person who thinks of his pocketbook only and doesn't care what happens to the rest of us.' This statement is libelous per se inasmuch as it charges plaintiff with onerous character defects so as to bring him into general community disrepute.

"(d) Defendant alleges in his letter that United Neighbors is an 'organization detested by the majority of our real neighbors,' is 'a self-serving and selfish group..(which) needs to be exposed.' These epithets and deorgatory (sic) suggestions, directed

against a class of persons which is so small (a half dozen families) that the average reader reasonably understands the derogatory statements to be intended as personal characterizations of the plaintiff as its president and principal spokesperson, is therefore libelous per se.

"(e) Defendant writes, 'Of course Mr. Chagall and his gang want to recall our city council, after all they won't respond to bribery.' This charge is libelous per se, alleging as it does the crime of attempting to bribe public officials, completed the moment an offer is made to give something to a public officer with corrupt intent to influence him in his official conduct (as defined by California Penal Code §7). Further, this is libel per se in that the average reader would conclude that plaintiff's failure to win consent of council members by offers of bribery was a primary motive behind his seeking to recall them."

The complaint further alleges that several months later, on July 6, 1989, appellant asked The Acorn Newspaper to print a retraction of the article but none was printed. Appellant claims that had the newspaper exercised ordinary and reasonable care, it would have realized or could have discovered that the article was false, grossly libelous and that the source of the information was of dubious credibility.[2]

Respondent Sobel demurred to the first amended complaint, and the trial court sustained the demurrer without leave to amend on May 14, 1990. The minute order stated that the ruling was "based on privelege set

---

2. In his original complaint and again in a complaint filed February 13, 1990, appellant further alleged the newspaper and its publisher were liable based on an editorial published November 9, 1989, expressing the publisher's view against a recall election backed by appellant and his organization, the United Neighbors of Agoura Hills. These allegations were not repeated in the operative first amended complaint, filed February 14, 1990.

forth in the First Amendment to the Constitution." A notice of ruling was filed June 15, 1990, and the order dismissing the action was filed June 18, 1990. Proof of service of the conformed copy of the order dismissing the action was filed on June 29, 1990.

On July 2, 1990, appellant filed a motion for reconsideration, predominately relying on a decision of the United States Supreme Court, decided June 21, 1990, Milkovich v. Lorain Journal Co. (1990) ___U.S.___, [111 L.Ed.2d 1, 110 S.Ct. 2695]. In its opposition to appellant's motion for reconsideration, respondent Sobel argued that California law still permits a privelege against defamation for opinions and that Milkovich should not be applied retroactively.

On October 4, 1990, the trial court granted appellant's motion for reconsideration. It vacated the minute order

of May 14, 1990, and its order dismissing the action. The court then sustained the demurrer without leave to amend "based on the California constitution and California cases." An order dismissing the action was filed October 18, 1990. Notice of entry of dismissal was filed November 14, 1990. Appellant filed his notice of appeal from the entry of dismissal "against the Plaintiff and in favor of the Defendant" on December 12, 1990.

Appellant argues that the Constitution of the State of California provides no blanket privelege for statements of opinion; that California case law recognizes the distinction between fact and opinion; that the letter to the editor in the case at bench consists of defamatory factual statements; and that the United States Constitutional standards are the supreme laws of the land and apply to California courts.

Respondent Sobel first argues that

appellant failed to file his notice of appeal in a timely fashion and this court lacks jurisdiction to consider the matter. Sobel then contends the trial court properly sustained the demurrer under California law and, at any rate, Milkovich should not be applied retroactively.

DISCUSSION

1. The appeal was timely filed.

Respondent Sobel argues that the notice of appeal was not timely filed in that pursuant to rule 2, California Rules of Court, it should have been filed within 60 days of notice of the original ruling dismissing the action. Respondent cites Passavanti v. Williams (1990) 225 Cal.App.3d 1602, for its discussion opining that a post-judgment motion for reconsideration will not extend the time for appeal under rule 3, California Rules of Court. (Id. at p. 1608.) However, as the Passavanti court acknowledged, there is authority allowing the trial court to

construe the motion for reconsideration to be a motion for new trial or a motion to vacate and therefore extend the time for filing appellant's notice of appeal pursuant to rule 3, California Rules of Court. (Ibid.) We think this approach is especially appropriate in a case such as that before us, where a United States Supreme Court case was decided on the very same issues before the trial court and appellant brought the new authority to the trial court's attention in a timely manner. Appellant's notice of appeal was timely filed.

2. The trial court did not err in dismissing the complaint.

Civil Code section 45 provides: "Libel is a false and unpriveleged publication by writing .. which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or

which has a tendency to injure him in his occupation." At least until the United States Supreme Court decided in Milkovich v. Lorain Journal Co. (1990) 111 L.Ed.2d 1, in June 1990, courts treated statements of opinion as constitutionally protected but imposed civil liability for statements of false fact. (Baker v. Los Angeles Herald Examiner (1986) 42 Cal.3d 254, 259-260; accord, Moyer v. Amador Valley J. Union High School Dist. (1990) 225 Cal.App.3d 720, 723.)

The Milkovich court, supra, 111 L.Ed.2d at page 17, deciding a case brought by a local high school wrestling coach against those responsible for an article in an Ohio newspaper, held that there is no "wholesale defamation exemption for anything that might be labeled 'opinion.'" However, "a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection." (Id. at p.18.)

In addition, there is "protection for statements that cannot 'reasonably [be] interpreted as stating actual facts' about an individual. [Citation.] This provides assurance that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation. [Citation.]" (Id. at p.19.)[3]

Prior to Milkovich, California courts developed a "'totality of the circumstances'"

---

3. The newspaper article in Milkovich was titled "Maple beat the law with the "big lie"'" (Id. at p.8) The article contained the language "'"Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott [the superintendent of Maple Heights public schools] lied at the hearing after each having given his solemn oath to tell the truth."'" (Id. at p.9.) The Supreme Court found this language "[N]ot the sort of loose, figurative or hyperbolic language which would negate the impression that the writer was seriously maintaining petitioner [Milkovich] committed the crime of perjury. Nor does the general tenor of the article negate this impression. [¶] We also think the connotation that petitioner committed perjury is sufficiently factual to be susceptible of being proved true or false." (Id. at p.19)

test to determine whether an alleged defamatory statement is one of opinion, and thereby protected, or one of fact. For words to be defamatory, they must be understood in a defamatory sense. [Citations.] . . . [¶] Next, the context in which the statement was made must be considered . . . [¶] This contextual analysis demands that the courts look at the nature and full content of the communication and to the knowledge and understanding of the audience to whom the publication was directed. [Citation.]" (Baker v. Los Angeles Herald Examiner, supra, 42 Cal.3d at pp.260-261.) Under California case law prior to Milkovich, the letter to the editor in the case at bench was not actionable. Construing the letter as a whole and not as separate segments (Dong v. Board of Trustees (1987) 191 Cal.App.3d 1572, 1587), the letter was written by respondent Sobel to the editor of the Acorn as Sobel's opinion in the context of public debate in a

local community regarding development, possible recall of public officials, and the nature of the current city council. "Columns by movie or television critics, like columns or articles which appear in the opinion-editorial pages of newspapers, are 'the well-recognized home of opinion and comment.' [Citations.]" (Baker, supra, 42 Cal.3d at pp.267-268; emphasis added.)

We need not decide if the letter is currently actionable under Milkovich or is protected under independent California constitutional protection of free speech. (See Cal.Const., art.I, § 2.) Rather, we will not make actionable the exercise of speech that was not actionable in California at the time it was made. (Long v. Pinto (1981) 126 Cal.App.3d 946, 950.)

The judgment is affirmed. Respondent Sobel is to recover costs on appeal from appellant.

NOT TO BE PUBLISHED

(Signed by) ROTH, P.J.

We concur:

FUKOTO, J.

NOTT, J.

For Chagall

Exhibit A: THE ARTICLE, (Published in Acorn.

EXHIBIT (A)

Dear Editor:

I have been reading the incredible letters published in your paper, especially those by David Chagall. In his latest attack, Mr. Chagall claims that the homeowners, especially in Old Agoura, are a special interest group opposed to all development and businesses. He also accused Mr. and Mrs. Haupt of hiding facts. How about outright dishonesty? Mr. Chagall is "president" of the "United Neighbors." What is this organization? It is *not* an organization of our *neighbors* although a *few* belong to it. It is a *developer* and *industrialist* run organization which the majority of our real neighbors detest and the truth about this self-serving and selfish group needs to be exposed. Mr. Chagall and his cohorts oppose all of the things most of us live in Agoura for. We don't oppose development but we do oppose destruction of a portion of the national park to do it! We don't oppose business but businesses do not belong in the middle of the most rural areas; they belong in shopping center areas at low elevations and should be in good taste. Mr. Chagall lives in an equestrian community but purposely plants trees in front of his house *poisonous* to horses. This *isn't* a good neighbor; this is a cruel person who thinks of *his* pocketbook only and doesn't care what happens to the rest of us. Most of us *do* favor Mr. Baxter Ward in Agoura. And well we should because Mr. Ward is honest; Antonovich has always hated Agoura and has done everything in his power to destroy its rural nature. If you favor turning Agoura into the next Van Nuys then join the United Neighbors and Mr. Chagall. If you want your children to continue to grow up in a community with an *honest* and fair city council stick with our present city council—they work hard and *favor tasteful* development. Of course Mr. Chagall and his gang want to recall our city council, after all they won't respond to bribery and they are honest and hard working citizens; they have done an incredible job and deserve an award for excellence, not a recall. It's unfortunate we can't start a petition to recall Mr. Chagall!

Barry Sobel

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES, DEPT.NWZ

DATE: May 14, 1990 N. Lucy, Deputy Clerk

HON.: Jerold A. Krieger, Judge

NWC 52693
DAVID CHAGALL, Counsel for Plaintiff, in pro per

VS.

BAKER COMMUNICATIONS, INC., ETC., ET AL, Counsel for Defendant, Thomas & Price

---

NATURE OF PROCEEDINGS: DEFENDANT BARRY SOBEL, DEMURRER TO PLAINTIFF'S FIRST AMENDED COMPLAINT

(handscripted) "Ruling based on privelege set forth in the First Amendment to the Constitution."

(side note, handscripted) "Vacated by order of court 10-4-90.
Attest N. Lucy, Deputy Clerk")

DEMURRER SUSTAINED WITHOUT LEAVE TO AMEND

NOTICE BY MOVING PARTY

MINUTES ENTERED
5-14-90
DEPT.NWZ COUNTY CLERK

APPENDIX B

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES, DEPT.NWZ

DATE: October 4, 1990 N. Lucy, Deputy Clerk

HON.: Jerold A. Krieger, Judge

NWC 52693
DAVID CHAGALL, Counsel for Plaintiff, in pro per

VS.

BAKER COMMUNICATIONS, INC., ETC., ET AL, Counsel for Defendant, Janet Keuper

---

NATURE OF PROCEEDINGS: PLAINTIFF'S MOTION FOR RECONSIDERATION OF ORDER DISMISSING ACTION

(Typed) "Plaintiff's motion for reconsideration is granted."

"The minute order of 5-14-90 is ordered vacated. The order dismissing the action filed 6-18-90 is vacated."

"The demurrer is sustained without leave to amend based on the California constitution and California cases."

NOTICE BY MOVING PARTY

MINUTES ENTERED
10-4-90
COUNTY CLERK

DEPT.NWZ

APPENDIX C

Second Appellate District, Division Two,

No.B055394 S023039

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

I N B A N K

DAVID CHAGALL, Appellant

v.

BAKER COMMUNICATIONS INC.,

Respondent

Supreme Court

F I L E D

Nov.20 1991

Apellant's petition for review DENIED.

L U C A S

Chief Justice

APPENDIX D

ARTICLE III, Section 2 TO THE UNITED STATES CONSTITUTION

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more States;--between a State and citizens of another State;--between citizens of different States;--between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects.

Appendix E

AMENDMENT I TO THE UNITED STATES CONSTITUTION

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Appendix F

AMENDMENT VII TO THE UNITED STATES CONSTITUTION

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of common law.

Appendix G

AMENDMENT XIV, Section 2

TO THE UNITED STATES CONSTITUTION

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the priveleges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction, the equal protection of the laws.

(2)

91-1408

Supreme Court, U.S.
FILED
MAR 24 1992
OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

DAVID CHAGALL,
PETITIONER

vs.

BARRY SOBEL, M.D., et al.,
RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF CALIFORNIA

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Janet L. Keuper, Esq.
THOMAS & PRICE
535 No. Brand Blvd., 5th Floor
Glendale, CA 91203
(818) 500-4800

Counsel of Record for Respondent
BARRY SOBEL

No._____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

DAVID CHAGALL,
PETITIONER

vs.

BARRY SOBEL, M.D., et al.,
RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF CALIFORNIA

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Janet L. Keuper, Esq.
THOMAS & PRICE
535 No. Brand Blvd., 5th Floor
Glendale, CA 91203
(818) 500-4800

Counsel of Record for Respondent
BARRY SOBEL

TABLE OF CONTENTS

		PAGE
1.	STATEMENT OF THE CASE.....	1
2.	SUMMARY OF ARGUMENT.....	5
3.	ARGUMENT.....	7
	1. PETITIONER HAS NOT ASSERTED A PROPER GROUND FOR SUPREME COURT REVIEW THEREBY JUSTIFYING DENIAL OF THIS PETITION FOR WRIT OF CERTIORARI.....	7
	2. THERE ARE ADEQUATE AND INDEPENDENT CALIFORNIA STATE GROUNDS UPON WHICH PETITIONER'S CLAIM WAS DECIDED JUSTIFYING DENIAL OF THIS PETITION.....	9
	3. ASSUMING THE APPLICABILITY OF MILKOVICH, THE PETITION SHOULD BE DENIED AS THE ANALYSIS WITHIN MILKOVICH WOULD NOT REQUIRE CORRECTING ANY DENIAL OF A FEDERAL RIGHT TO PETITIONER.....	18
4.	CONCLUSION.....	24

TABLE OF AUTHORITIES

STATUTES: **PAGE NO.**

First Amendment, U.S. Constitution.. 19

California Constitution, Art. 1.... 10,23

28 USCS 1257..... 17

CASE: **PAGE NO.**

Baker v. Herald Examiner (1986) 42 Cal.3d 254.... 10,11,12,17,18,19,20,21

Greenbelt Pub. Assn. v. Bresler (1970) 398 U.S. 6, 90 S.Ct. 1537, 26 L.Ed.2d 6..... 14

Grillo v. Smith (1983) 144 Cal.App. 3d 868..... 22

Hustler Magazine v. Falwell (1988) 485 U.S. 46, 99 L.Ed.2d 41, 108 S.Ct. 876..... 14,23

Koch v. Goldway (9th Cir. 1987) 817 F.2d 507..... 20

Miedrich v. Lauenstein (1914) 232 U.S. 236, 58 L.Ed. 584, 34 S.Ct. 309..... 24

Milkovich v. Lorain Journal Publishing Co. (1990) 497 U.S. ___, 110 S.Ct. 2695, 111 L.Ed.2d 1..... 2-6, 11-13,15,17-20,23,24

Moyer v. Amador Valley J. Union High School District (1990) 225 Cal.App.3d 720..... 3,11,15,16,20

Old Dominion Branch No. 496, etc. v. Austin (1974) 418 U.S. 264, 94 S.Ct. 2770, 41 L.Ed.2d 745..... 14

Ollman v. Evans (D.C.Cir.1984) 750 F.2d 970..... 15,22

Waters Pierce Oil Company v. Texas (1909) 212 U.S. 86, 29 S.Ct. 220, 53 L.Ed. 417..... 18

Weller v. American Broadcasting Companies, Inc. (1991) 232 Cal.App.3d 991..... 13,14

Zacchini v. Scripps-Howard Broadcasting Co. (1977) 433 U.S. 562, 97 S.Ct. 2849, 53 L.Ed.2d 965..... 9

No._____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

OCTOBER TERM, 1991

DAVID CHAGALL, Petitioner

vs.

BARRY SOBEL, M.D., et al., Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

STATEMENT OF THE CASE

This case arises out of a letter to the editor of the local newspaper in the community of Agoura Hills. Petitioner was a community activist who was orchestrating

a grass roots effort to recall four city council member during a period of political upheaval over community development. This case focuses on a letter to the editor regarding petitioner and his involvement with the political debate in the community.

Petitioner's First Amended Complaint was the subject of Demurrer by respondent, the Demurrer raising issues of the perceived constitutional protection for matters of personal opinion. The Demurrer was sustained without leave to amend.

After the Order of Dismissal was signed, petitioner sought reconsideration based upon this Court's decision in Milkovich v. Lorain Journal Publishing Co. (1990) 497 U.S.___ , 110 S.Ct. 2695, 111 L.Ed.2d 1. The Milkovich case was decided three days post-dismissal of petitioner's action against respondent. The Motion for Reconsideration was strongly opposed and

argued for Demurrer under an analysis of the California Constitution and California cases interpreting those provisions. In focusing on the California Constitutional provisions as well as California case law interpreting those provisions, the trial Court renewed its ruling of sustaining the Demurrer without leave to amend, focusing on the California Constitution and the California case law.

Before the California Court of Appeal, Second Appellate District, petitioner sought review of the trial Court's ruling. In affirming the decision of the trial Court, the Court of Appeal had before it not only the record in the case at Bench but the Milkovich opinion as well as California case law incorporating its opinion. (See Moyer v. Amador Valley J. Union High School District (1990) 225 Cal.App.3d 720.) The Court of Appeal, while declining to decide the issue of

retroactivity of the Milkovich decision, affirmed the ruling of the trial Court, and held that they would not make actionable the exercise of speech that was not actionable in California at the time it was made. (See decision of the Court of Appeal of the Second Appellate District, page 10)

The California Supreme Court, on Petition for Review, had before it the opinion of the California Appellate Court and the long standing California case precedent in its support. The California Supreme Court denied petitioner review.

SUMMARY OF ARGUMENT

The three grounds asserted by petitioner for granting this Writ of Certiorari are ill founded; the bases submitted by petitioner do not entitle him to review by this Court.

The ruling of the California State Courts was based upon adequate and independent State grounds. The California Court held that it would not make actionable that which was protected speech when it was made. Subsequent California cases have affirmed that the long standing analysis by which to analyze this dichotomy between fact and opinion is by using the totality of the circumstances test. There are adequate and independent State grounds to support the California Court's decision.

Even in light of Milkovich and a determination that it is applicable to the case at bench, the California Appellate

Court and the California Supreme Court rendered opinions consistent and in light of Milkovich. Not only was the Milkovich analysis and holding incorporated, but post-Milkovich California Appellate Court cases have interpreted and followed Milkovich.

In light of petitioner's status as a public figure in a matter which was an issue of public concern, the analysis under Milkovich would not change the ruling of the California State Courts.

1. PETITIONER HAS NOT ASSERTED A PROPER GROUND FOR SUPREME COURT REVIEW THEREBY JUSTIFYING DENIAL OF THIS PETITION FOR WRIT OF CERTIORARI.

Petitioner has asserted three grounds for granting this Petition for Writ of Certiorari: That the California State Courts denied him a federal right by basing their decision on the California State Constitution and California case law then in effect; That he was further denied this federal right by the imposition of a non-federal ground of decision without fair support; and, That petitioner was denied his right to trial by jury.

Each of these alleged bases for granting this Petition are ill founded as pertaining to the case at bench.

Initially, it is difficult to determine what federal right petitioner claims he has been denied by the California Courts

basing their ultimate decision on the California Constitution and the California case law. Assuming that the federal right to which petitioner claims denial is the right to have a jury adjudicate his claim, neither the California Court, nor the federal Court system, allow a claim to be pursued when, as a matter of law, a claim cannot be stated against an opposing party.

Petitioner claims that he was denied this right when the California trial Court based their decision on the California State Constitution and California case law. Contrary to petitioner's assertion, the ruling of the trial Court was made with fair support of State grounds. There are adequate and independent State grounds for the decision of the California trial Court and the subsequent affirmation by the California Appellate Courts.

2. THERE ARE ADEQUATE AND INDEPENDENT CALIFORNIA STATE GROUNDS UPON WHICH PETITIONER'S CLAIM WAS DECIDED JUSTIFYING DENIAL OF THIS PETITION.

The grounds of the trial Court in sustaining petitioner's Demurrer without leave to amend, as affirmed by the California Appellate Courts, are based on adequate and independent State grounds and do not entitle petitioner to review in this Court. The rule that the Supreme Court has no jurisdiction to review a case if the judgment is supported by adequate state grounds is based on the observation that the adequate state ground controls the result with the case, no matter what the Supreme Court may say about the merits of the federal issue. Zacchini v. Scripps-Howard Broadcasting Co. (1977) 433 U.S.562, 97 S.Ct. 2849, 53 L.Ed.2d 965.

The California Constitution provides its citizenry the following assurances

regarding the right to speak freely by proclaiming that every person may freely speak, write and publish his or her own sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press. California Constitution, article 1, section 2(a).

In 1986 the California Supreme Court decided Baker v. Herald Examiner (1986) 42 Cal.3d 254. In that decision, the Court held that the Court must apply the Constitution by carefully distinguishing between statements of opinion and fact, treating the one as constitutionally protected and imposing on the other civil liability for its abuse. Baker, supra, at 259. However, the Court went on to discuss what utterances are worthy of constitutional protection and found that the totality of the circumstances test is used to determine what is defamatory and

what is rhetorical hyperbole. Baker, supra at 260. The Court then applied a totality of the circumstances test to determine what, in fact, is opinion and what is defamatory. The Court specifically looked to the arena in which the utterance was published.

Following the Milkovich decision, the California Appellate Court decided Moyer v. Amador Valley J. Union High School District (1990) 225 Cal.App.3d 720. In that case, the Appellate Court had to decide whether or not the statements published in a story in a high school student newspaper were defamatory. In affirming the trial Court's sustaining of defendant's Demurrer without leave to amend, the Court of Appeal held that the statements about the appellant were not actionable. The Moyer Court noted the perceived fundamental distinction between statement of fact and statements of

opinion held by the California Courts. The California Court had employed a "totality of the circumstances" test to differentiate between fact and opinion:

"First, the language of the statement is examined. For words to be defamatory, they must be understood in the defamatory sense.... Next, the context in which the statement was made must be considered.... This contextual analysis demands that the courts look at the nature and full content of the communication and to the knowledge and understanding of the audience to whom the publication was directed." Moyer, supra, at 724 (see also Baker v. Los Angeles Herald Examiner, supra.)

The Court went on to note that Milkovich did not substantially change these principals; rather, it underscored the necessity for a reviewing Court to make an independent examination of the whole record in order to insure that there

is no infringement of free expression. The Court continued by analyzing the circumstances of the individual case within the 'totality of the circumstances' test and within the analysis and in light of the decision in Milkovich.

In July, 1991, the California Appellate Court decided Weller v. American Broadcasting Companies, Inc. (1991) 232 Cal.App.3d 991. Although the Court found that the statements made by defendants could be understood in a defamatory sense, it applied the totality of the circumstances analysis within the considerations of the Milkovich decision. It reiterated and affirmed the High Court's decision that, the Bresler-Letter Carriers-Falwell line of cases provide protection for statements that cannot 'reasonably be interpreted as stating actual facts' about an individual because it is expressed in loose figurative and

hyperbolic language, and/or the context and tenor of the statements negates the impression that the author is seriously maintaining an assertion of actual fact. Weller, supra, at 1000, 1001. See Greenbelt Pub. Assn. v. Bresler (1970) 398 U.S. 6, 90 S.Ct. 1537, 26 L.Ed.2d 6.; Old Dominion Branch No. 496, etc. v. Austin (1974) 418 U.S. 264, 94 S.Ct. 2770, 41 L.Ed.2d 745; Hustler Magazine v. Falwell (1988) 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41.

California State Courts as well as the Federal Courts have acknowledged the difficulty in distinguishing fact from opinion. As Justice Bork opined, "I start with candid recognition that the universe of statements cannot be neatly divided by some logically discernable equator into hemispheres of fact and opinion. Fact is the germ of opinion, and the transition from assertion of facts to expression of

opinion is a progression along a continuum. A reviewing Court's charge is to determine, in light of the considerations inspiring first amendment jurisprudence and the surviving policies underlining common law protection of reputation, the point at which we should draw the line marking off the portion of speech to be accorded the absolute constitutional protection of opinion rather than the conditional privilege afforded representations of fact." Ollman v. Evans (D.C.Cir.1984) 750 F.2d 970 at 1021.

The Moyer Court noted the recent decision of the high Court in Milkovich but recognized that Milkovich does not change substantive California law in this area as analyzed post-Milkovich by the California Courts. Existing constitutional doctrine remained operative to protect free expression of ideas. That is,

statements that cannot be "reasonably interpreted as stating actual facts" are still entitled to constitutional protection. Moyer, supra, at 724. The reviewing Court then conducted their analysis based upon California case law precedent and using the totality of the circumstances test. The Court looked to the audience to whom the publication was addressed and whether or not the statement could be understood to state actual facts. Further, in determining the issue, the Court considered the nature and meaning of the language used, including the context in which the statements appeared. Moyer, supra.

In looking at the history of the California Court's analysis of the distinction between fact and opinion, the California Courts have long been using a totality of the circumstances test to analyze whether or not a statement is fact

or opinion, providing constitutional protection to those utterances which are determined to be opinion. This is consistent with the Milkovich opinion.

The California Supreme Court and the Courts thereunder which have, since Baker v. Herald Examiner, supra, used a totality of the circumstances test to analyze and provide constitutional protection for those utterances found to be opinion, and providing recourse for those which are not, is adequate to justify the opinion of the California Courts in the case at Bench. The Supreme Court's jurisdiction to review a State Court decision under 28 USCS 1257, whether by appeal or certiorari, is dependant upon the presence of a federal question in the case. The reason for this requirement is that the Supreme Court is not a Court of general jurisdiction which can correct any error in State Court proceedings. Its powers

are limited to correct denials of federal rights in specific instances. Waters Pierce Oil Company v. Texas (1909) 212 U.S. 86, 29 S.Ct. 220, 53 L.Ed. 417. Petitioner's Writ of Certiorari should be denied.

3. ASSUMING THE APPLICABILITY OF MILKOVICH, THE PETITION SHOULD BE DENIED AS THE ANALYSIS WITHIN MILKOVICH WOULD NOT REQUIRE CORRECTING ANY DENIAL OF A FEDERAL RIGHT TO PETITIONER.

Milkovich did not substantially change the principal analysis performed by California Courts which have been applying the totality of the circumstances test at least since the California Supreme Court decision in Baker. Milkovich, underscored the principal that a reviewing Court must make an independent examination of the whole record in order to insure that there

is no infringement of free expression. Milkovich, Id.

Petitioner was a public figure. He threw himself into the middle of a public debate on community development by orchestrating a grass-roots effort to recall four city council members. The local community newspaper was the home of many letters to the editor regarding the hotly debated political issues. Petitioner was himself the author of letters to the editor pertaining to these issues.

Before Milkovich, the California Courts had employed a "totality of the circumstances" test to differentiate between fact and opinion.... Baker, supra, at 260-261. Milkovich did not substantially change these principals; it underscored that in cases such as this, raising First Amendment issues, a reviewing Court must make independent

examination of the whole record in order to insure that there is no infringement of free expression. Milkovich, 497 U.S. at p.__, 111 L.Ed.2d at p.17. Moyer, supra, at 724. Existing constitutional doctrine remained operative to protect free expression of ideas. That is, statements that cannot be "reasonably interpreted as stating actual facts" are still entitled to constitutional protection." The question is one of law for the Court. Baker, supra, at 260; Moyer, supra, at 724; Koch v. Goldway (9th Cir. 1987) 817 F.2d 507.

Determining reasonableness, as a matter of law, encompasses an analysis of the totality of the circumstances. In affirming the trial Court's dismissal of the Complaint, the California Appellate Court applied an analysis under the California Constitution and California cases. Those California cases have, since

well before the utterance which gives rise to this lawsuit, conducted an analysis under a totality of the circumstances test.

Where potentially defamatory statements are published in a public debate, a heated labor dispute, or in another setting in which the audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole, language which generally might be considered as statements of fact may well assume the character of statements of opinion. Baker, supra, at 260. It is common knowledge to the average reader that the editorial page is the traditional location of a publication's opinions and frequently the conflicting opinions of others. It is typically devoted to a discussion of ideas, not the transmission of the news.

Grillo v. Smith (1983) 144 Cal.App.3d 868, 874.

In considering the totality of the circumstances, the Court must factor into the equation the extent to which the issue is one of public concern. The public has an interest in receiving information on issues of public importance even if the trustworthiness of the information is not absolutely certain. The first amendment is served not only by articles and columns that purport to be definitive but by those articles that, more modestly raise questions and prompt investigation or debate. By giving weight on the opinion side of the scale to cautionary and interrogative language, Courts provide greater leeway to journalists and other writers and commentators on bringing issues of public importance to the public's attention and scrutiny. Ollman v. Evans, supra, at 983.

In applying California cases to the facts of the case at Bench, even in light of the decision in Milkovich, the result is the same. Milkovich held that there is no separate first amendment privilege of opinion, but recognized the existing Constitutional doctrine to protect free expression of ideas. Statements that cannot be "reasonably interpreted as stating actual facts" are still entitled to Constitutional protection. Milkovich, 497 U.S. at p.__, 111 L.Ed.2d at p.19; See Also Hustler Magazine v. Falwell (1988) 485 U.S.46, 50, 57, 99 L.Ed.2d 41, 48, 53, 108 S.Ct. 876.

A reviewing Court must make an independent examination of the whole record in order to insure that there is no infringement of free expression. Milkovich, Id. A review of the whole record by the reviewing California State Court justified affirmation of the trial

Court's holding. In applying the 'totality of the circumstances' test and reviewing the whole record, the California Courts came to their decision by an analysis consistent with California precedent, yet incorporating the Milkovich opinion.

The powers of the Supreme Court need not be invoked in the case at Bench as there is no federal right to be corrected. If the State Court holds that a federal question was properly presented according to State practice, and proceeds to determine it, the United States Supreme Court will not further inquire into the matter. Miedreich v. Lauenstein (1914) 232 U.S. 236, 58 L.Ed. 584, 34 S.Ct. 309.

CONCLUSION

The three grounds asserted by petitioner for granting the Writ of Certiorari are ill founded as the federal right which he claims to have been denied,

the right to a trial by jury, is only applicable if it is determined, as a matter of law, that a claim can be stated. In this case, the California Courts have determined that, as a matter of law, petitioner cannot state a claim against respondent. The California Appellate Courts, in affirming the trial Court's dismissal, had before them California case law precedent and the decision of Milkovich as interpreted by California case law in affirming the dismissal by the trial Court of petitioner's Complaint.

Petitioner threw himself into the political arena by his grass-roots effort to recall city council members within a public debate regarding community development. By doing so, and by himself submitting letters to the editor for publication on this very issue, he invited differing comment. The editorial page is the traditional location of a

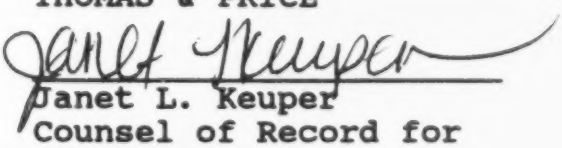
publication's opinions and frequently the conflicting opinions of others. The California Courts have determined that, within the totality of the circumstances and looking at the whole record to insure that there is no infringement of free expression, petitioner could not state a claim as a matter of law.

It is therefore respectfully requested that the Petition For Writ of Certiorari be denied.

DATED: March 19, 1992

Respectfully submitted,

THOMAS & PRICE



Janet L. Keuper
Counsel of Record for
Respondent
Barry Sobel

DECLARATION OF FILING
28 USC § 1746

I, Janet L. Keuper, do swear and declare that on this date, MARCH 23, 1992, pursuant to Supreme Court Rules 29.3 and 29.4, I have filed 40 copies of the enclosed RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI with the United States Supreme Court by depositing an envelope containing the above documents in the United States mail properly addressed and with first class postage prepaid and in accordance with 28 U.S.C. § 1746 addressed as follows:

Clerk, the
United States Supreme Court,
1 First Street, N.E.,
Washington, D.C. 20543

By: Janet Keuper
Janet L. Keuper, Declarant

PROOF OF SERVICE

I, Janet L. Keuper, do swear and declare that on this date, MARCH 23, 1992, pursuant to Supreme Court Rules 29.3 and 29.4, I have served the enclosed RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first class postage prepaid and in accordance with 28 U.S.C. § 1746.

The names and addresses of those served are as follows:

3 copies to:
David Chagall in Pro Per,
28232 Foothill Drive,
Agoura Hills, CA 91301

1 copy to:
Clerk,
California Supreme Court
300 So. Spring St., 2nd Floor
Los Angeles, CA 90013

By: Janet Keuper
Janet L. Keuper, Declarant